Merck KGaA v Leno Marketing (M) Sdn Bhd (Registrar of Trade Marks, interested party)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-9–04 OF 2017(W)
RAUS SHARIF (CHIEF JUSTICE), ZULKEFLI PCA, RAMLY ALI, ZAHARAH IBRAHIM AND BALIA YUSOF FCJJ
7 MAY 2018

Trade Marks — Registration — Registration of trademark — Challenge against registration of trademark — Registration of trademark allowed by Registrar — Appeal to High Court — Whether High Court exercising appellate or original jurisdiction — Scope and meaning of 'original jurisdiction' and 'appellate jurisdiction' — Trade Marks Act 1976 ss 28(5), (6) & (7)

The appellant, an international pharmaceutical company based in Germany, was the registered owner of the trademarks 'BION' and 'BION 3' in Classes 5, 29 and 30. The respondent applied to register the trademark 'Bionel' in Class 5 and the Registrar accepted the application. Upon the publication of the respondent's application in the *gazette*, the appellant filed a notice of opposition before the Registrar under s 28 of the Trade Marks Act 1976 ('the TMA') on the ground that the respondent's mark was confusingly or deceptively similar to the appellant's mark and the registration would likely deceive or cause confusion amongst the public. The Registrar dismissed the appellant's opposition an accordingly registered the respondent's trademark. The appellant appealed against the decision of the Registrar at the High Court but the High Court agreed with the findings of the Registrar and dismissed the appellant's appeal. Dissatisfied, the appellant appealed to the Court of Appeal but the Court of Appeal too dismissed the appellant's appeal. Hence the present appeal. The issue that arose for the court's adjudication were whether the High Court, in exercising its powers under s 28(5), (6) and (7) of the TMA, was acting in its original or appellate jurisdiction.

Held, dismissing the appeal with costs:

(1) In hearing an appeal from the decision of the Registrar under s 28 of the TMA, the High Court does not take cognisance of the matter and determine the dispute at the first instance. On the contrary, the provisions of s 28 indicate that the appeal to the High Court is a re-hearing of the original cause before the Registrar. The High Court is empowered to examine the merits of the case, correct errors in the Registrar's decision and make such orders as sought to have been made at first instance. The High was exercising its appellate jurisdiction in

hearing an appeal from the decision of the Registrar under s 28 of the TMA. Therefore, the present appeal did not meet the statutory condition for an appeal to this court under s 96(a) of the Courts of Judicature Act 1964. The matter ended at the Court of Appeal (see paras 75 & 95–96).

[Bahasa Malaysia summary

Perayu, sebuah syarikat farmaseutikal antarabangsa yang berpusat di Jerman, adalah pemilik berdaftar 'BION' dan 'BION 3' di bawah Kelas 5, 29 dan 30. Responden memohon untuk mendaftarkan cap dagangan 'Bionel' di bawah Kelas 5 dan Pendaftar membenar permohonan tersebut. Apabila permohonan responden disiarkan dalam *warta*, perayu memfailkan notis bantahan di hadapan Pendaftar di bawah s 28 Akta Cap Dagangan 1976 ('Akta') atas alasan cap dagangan responden serupa, dengan cara mengelirukan atau memperdayakan, dengan tanda perayu dan pendaftaran tersebut mungkin akan menipu atau menyebabkan kekeliruan dalam kalangan orang ramai. Pendaftar menolak bantahan perayu dan dengan wajarnya mendaftarkan cap dagangan responden. Perayu merayu terhadap keputusan Pendaftar di Mahkamah Tinggi tetapi Mahkamah Tinggi bersetuju dengan dapatan Pendaftar dan menolak rayuan perayu. Tidak berpuas hati, perayu merayu di Mahkamah Rayuan tetapi Mahkamah Rayuan juga menolak rayuan perayu. Oleh itu, rayuan ini. Isu yang timbul untuk pertimbangan mahkamah adalah sama ada Mahkamah Tinggi, dalam menjalankan kuasanya di bawah s 28(5), (6) dan (7) Akta, bertindak dalam bidang kuasa asal atau rayuannya.

Diputuskan, menolak rayuan dengan kos:

(1) Semasa mendengar rayuan terhadap keputusan Pendaftar di bawah s 28 Akta, Mahkamah Tinggi tidak mengambil kira hal perkara dan memutuskan pertikaian tersebut dari mula lagi. Sebaliknya, peruntukan s 28 menunjukkan bahawa rayuan ke Mahkamah Tinggi adalah pendengaran semula kausa asal di hadapan Pendaftar. Mahkamah Tinggi diberi kuasa untuk memeriksa merit kes, memperbetulkan kekhilafan dalam keputusan Pendaftar dan membuat perintah seperti yang dipohon pada asalnya. Mahkamah Tinggi menjalankan bidang kuasa rayuannya dalam mendengar rayuan terhadap keputusan Pendaftar di bawah s 28 TMA. Oleh itu, rayuan ini tidak memenuhi syarat statutori rayuan ke mahkamah ini di bawah s 96(a) Akta Mahkamah Kehakiman 1964. Hal perkara ini berakhir di Mahkamah Rayuan (lihat perenggan 75 & 95–96).]

Notes

For cases on registration in general, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3024–3064.

Cases referred to

Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor [2008] 3 MLJ 771, FC (refd)

Abdul Halim Mohyiddin v Malaysian Institute of Accountants (MIA) [2001] 5 MLJ 497, HC (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)

Ang Cheng Hai & Ors v PP and another appeal [1995] 3 SLR 201, CA (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors [1995] 2 MLJ 549, FC (refd)

Bachoo Mohan Singh v PP and other applications [2010] 1 SLR 966, CA (refd)

Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd [2015] 1 SLR 797; [2014] SGCA 61, CA (refd)

Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors [1999] 1 MLJ 257, FC (refd)

Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd (1959) 101 CLR 652, HC (refd)

Farrell v Alexander [1976] 2 All ER 721, HL (refd)

Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35, SC (refd)

Generation Products Sdn Bhd v Majlis Perbandaran Klang [2008] 6 MLJ 325, FC (refd)

Gurbachan Singh v PP [1967] 2 MLJ 220, FC (refd)

Greendale Developments Ltd (in liquidation); Stephen Fagan and May Malone v Liam McQuaid; In the matter of [2000] 2 IR 514, SC (refd)

Jafferjee v Scarlett (1937) 57 CLR 115, HC (refd)

Kemper Reinsurance Co v Minister of Finance and Others [1998] 3 LRC 633, PC (refd)

Ketua Pengarah Hasil Dalam Negeri v Syarikat Jasa Bumi (Woods) Sdn Bhd (Civil Application No 08–31 of 1999(S)), (unreported) (refd)

Kiew Ah Cheng David v PP [2007] 1 SLR 1188, CA (folld)

Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd (now known as Koperasi Keretapi Bhd) v Kumar a/l Gurusamy [2011] 2 MLJ 433, FC (folld)

Kulasingam v PP [1978] 2 MLJ 243, FC (refd)

LP v MP [2002] 1 IR 219, SC (refd)

Lam Kong Co Ltd v Thong Guan Co Pte Ltd [2000] 4 MLJ 1, FC (refd)

Lee Lee Cheng (F) v Seow Peng Kwang [1960] 1 MLJ 1, CA (refd)

Lee Soo Chuan v Lai Ah Yan & Anor [1972] 2 MLJ 33, FC (refd)

Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd [2014] 2 MLJ 1, FC (refd)

Louise Poletti v Deputy Commissioner of Taxation [1994] 124 ALR 373, FC (refd)

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, FC (refd)
Mickelberg and Another v R [1990] LRC (Crim) 70, HC (folld)
Munusamy v Subramaniam & Ors [1969] 2 MLJ 108 (refd)
Ng Chye Huey and Another v PP [2007] SGCA 3, CA (refd)
Podbery v Peak and another [1981] 1 All ER 699, CA (refd)
PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685, FC (refd)
R (on the application of Cart) v Upper Tribunal (Secretary of State for Justice and others, interested parties) (Public Law Project intervening) R (on the application of MR (Pakistan)) v Upper Tribunal (Secretary of State for the Home Department and another, interested parties) (Public Law Project intervening) [2011] 4 All ER 127; [2011] UKSC 28, SC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Registrar of Trade Marks v Woolworths Ltd (1999) 45 IPR 411, FC (refd)
Ruhani v Director of Police (2005) 219 ALR 199, HC (folld)
Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753, FC (refd)
Siow Chung Peng v PP [2014] 4 MLJ 504, FC (refd)
Stokes v Christian Brothers High School, Clonmel [2015] IESC 13, SC (refd)
Sundaram v Chew Choo Khoon [1968] 2 MLJ 40 (refd)
Sussex Peerage Case (1844) 11 Cl & Fin 85, HL (refd)
Tan Sri Eric Chia Eng Hock v PP (No 1) [2007] 2 MLJ 101, FC (refd)
Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25, FC (refd)
The King against The Chancellor, Masters and Scholars of the University of Cambridge (1723) 1 Str 557, KB (refd)
Tio Chee Hing v United Overseas Bank (M) Bhd [2013] 3 MLJ 212, FC (consd)
Valley Beef Co-Operative Ltd v Farm Credit Corp [2002] SJ No 499, CA (refd)
Wong Hong Toy & Anor v PP [1994] 2 SLR 396, CA (folld)
Yong Teng Hing (t/a Hong Kong Trading Co) & Anor v Walton International Ltd [2011] 5 MLJ 629, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 22, 23, 23(1), (2), 24, 25, 25A, 27, 35, 69, 87, 96, 96(a)
Consumer Protection Act 1999
Cooperative Societies Act 1993 s 83, 83(7)
Courts Ordinance 1948 s 47
Federal Constitution arts 121(2)(a), 128(3)
Income Tax Act 1967
Interpretation Acts 1948 and 1967 s 16
Land Ordinance (Cap 68) s 41
Legal Profession Act 1976 s 103E(1), (5)
Rules of Court 2012 O 55A, O 87, O 87 rr 3, 2

A Supreme Courts of Judicature Act [SG] ss 18(2), 29A(2), First Schedule, item 10
Supreme Courts of Judicature Act 1873 [UK]
Trade Marks Act 1976 ss 3, 14, 19, 28, 28(5), (6), (7), 45, 46, 56(15), 67, 69
B Trade Marks Act 1995 [AUS]

Appeal from: Civil Appeal No W-01(PCV)(A)-69–03 of 2016 (Court of Appeal, Putrajaya)

C *Cyrus Das (Nor Athirah bt Khairol Anuar with him) (Miranda & Samuel) for the appellant.*
Arun Kasi (Esther Ong Tengku Saiful & Sree) for the respondent.

Raus Sharif (Chief Justice) (delivering judgment of the court):

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INTRODUCTION

[1] The appellant challenged the registration of the respondent's trademark in opposition proceedings before the Registrar of Trade Marks ('the registrar'). The registrar dismissed the appellant's opposition and allowed the registration of the respondent's trademark. The appellant appealed against the decision of the Registrar to the High Court.

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F **[2]** On 22 January 2016, the High Court dismissed the appellant's appeal. Upon further appeal, the Court of Appeal on 7 November 2016 affirmed the decision of the High Court.

[3] Leave to appeal was granted to the appellant by this court on 15 March 2017 for the following questions of law:

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(a) whether the High Court in exercising its powers under s 28(5), (6) and (7) of the Trade Marks Act 1976 ('the TMA') is acting in its original jurisdiction or appellate jurisdiction? ('question 1');

H (b) whether as a matter of law a lower or reduced standard should be applied for determining similarity or likelihood of confusion in cases involving pharmaceutical and medicinal products under ss 14 and 19 of the TMA? ('question 2');

I (c) whether the Registrar of Trade Marks in exercising the powers under ss 14 and 19 of the TMA to determine similarity and likelihood of confusion for purposes of registration of a new mark is obliged to consider the public interest where the goods involved are pharmaceutical and medicinal products? ('question 3'); and

(d) where the existing registered trademark (BION) is an invented name whether it is incumbent on the applicant for registration of the new mark (BIONEL) to justify the choice of name bearing aural and conceptual similarity to the existing mark? ('question 4').

[4] At the hearing of this appeal, the respondent raised the preliminary objection that the present appeal before this court was not competent. As a result, we directed parties to confine their oral submissions to question 1, being the threshold question of jurisdiction, before we hear further submissions on the remaining questions. This is our decision on the jurisdiction of this court to hear the present appeal.

Material facts

[5] The appellant (the plaintiff in the High Court) is an international pharmaceutical company based in Germany. In Malaysia, the appellant is the registered owner of the trademarks 'BION' and 'BION 3' in Classes 5, 29 and 30.

[6] On 18 July 2008, the respondent (the defendant in the High Court) applied vide application No 08014118 to register the trademark 'Bionel' in Class 5 for goods of 'pharmaceutical, veterinary and sanitary substance; infants' and fat and invalids' foods; plasters, materials for bandaging, materials for stopping teeth, dental wax; all included in Class 5'. The registrar accepted the respondent's application.

[7] Upon the publication of the respondent's application in the *gazette*, the appellant filed a notice of opposition before the registrar under s 28 of the TMA. The main grounds of the appellant's opposition were that the respondent's mark was confusingly or deceptively similar to the appellant's mark, and that the registration would likely deceive or cause confusion amongst the public. On 13 April 2015, having heard the parties, the registrar dismissed the appellant's opposition and accordingly registered the respondent's trademark.

[8] The appellant appealed against the decision of the Registrar to the High Court pursuant to s 28(5) and s 28(6) of the TMA. On 22 January 2016, the High Court agreed with the findings of the registrar and dismissed the appellant's appeal.

[9] Dissatisfied, the appellant appealed to the Court of Appeal. On 7 November 2016, the Court of Appeal dismissed the appeal, noting the concurrent findings of the High Court and the registrar.

Submissions

[10] As stated earlier, counsel for the respondent raised a preliminary objection in respect of the competence of the present appeal. In brief, the respondent submitted that s 96 of the CJA limits the appellate jurisdiction of the Federal Court to matters decided by the High Court in the exercise of its original jurisdiction. However, it was contended that the CJA is not the only source of the original and appellate jurisdiction of the High Court; various statutes confer original jurisdiction on the High Court, or confer original jurisdiction on some tribunal and appellate jurisdiction on the High Court.

[11] It was contended for the respondent that the TMA confers appellate jurisdiction on the High Court, with an appeal procedure as provided for in O 55A of the Rules of Court 2012. The respondent relies on the case of *Tio Chee Hing v United Overseas Bank (M) Bhd* [2013] 3 MLJ 212, wherein this court held that the High Court, in hearing an appeal from the decision of the Director of Lands and Surveys under the Sabah Land Ordinance, was exercising its appellate jurisdiction. Thus, it was argued by the respondent that since the present appeal did not emanate from a decision of the High Court in its original jurisdiction, the appeal lies outside the scope of s 96 of the CJA and must be dismissed in limine.

[12] In response, counsel for the appellant submitted that the High Court deciding on an appeal from the decision of the registrar is exercising original jurisdiction. The crux of the appellant's contention is that the term 'appeal' in the TMA is not conclusive of the nature of the legal proceedings; rather, it is the substantive provisions of the statute that are determinative. It was contended that there is no presumption that the term 'appeal' is to be treated as an exercise of appellate jurisdiction by the High Court. With reference to the CJA, the appellant argued that s 27 under the chapter heading of 'Appellate Jurisdiction' restricts the appellate jurisdiction of the High Court to appeals from subordinate courts, whereas s 23 under the heading 'Original Jurisdiction' suggests that any other jurisdiction vested in the High Court by written law constitutes original jurisdiction.

[13] According to the appellant, this court in *Yong Teng Hing (t/a Hong Kong Trading Co) & Anor v Walton International Ltd* [2011] 5 MLJ 629 has settled the point that the High Court exercises an original jurisdiction in hearing appeals from the registrar under the TMA. The appellant argued that other cases including *Tio Chee Hing*, in which the High Court was held to exercise an appellate jurisdiction in hearing appeals from tribunals, were distinguishable based on the specific provisions of the relevant statutes.

[14] Unlike the statutes in those cases, it was highlighted that the TMA does

not expressly provide that the right of appeal to the High Court would be in its appellate jurisdiction, or that the rules of procedure for appeals from subordinate courts were to apply. On the contrary, the appellant submitted that the following provisions in the TMA are indicative of the High Court's original jurisdiction in hearing appeals from the registrar: the rules committee may make rules to regulate such proceedings in the High Court; the High Court may exercise all the discretionary powers conferred upon the registrar; and the High Court may if required hear the parties and the registrar.

[15] The test for original jurisdiction, the appellant submitted, is whether the proceeding is the origination of the process in the court for a judicial determination for the first time. Relying on Australian authorities, the appellant contended that 'appeals' from administrative decisions are not appeals in the strict sense, but lie in the original jurisdiction of the court. Noting the similarity between the trademarks appeal systems in Malaysia and Australia, the appellant further argued that Australian courts have held that the High Court acts in its original jurisdiction in hearing appeals from the Registrar of Trade Marks. The appellant thus submitted that the present appeal is competent.

RIGHT OF APPEAL TO THE FEDERAL COURT

General principles

[16] In modern judicial systems that acknowledge the need for redress for the mistakes of judges, the right of appeal has come to be regarded as an essential requirement of natural justice (JH Baker, *An Introduction to English legal History* (2nd Ed, London: Butterworths, 1979) at p 116). As long ago as 1723 it was described as a 'glory and happiness' of the English constitution 'that to prevent any injustice no man is concluded by the first judgment; but that if he apprehends himself to be aggrieved he has another court to which he can resort for relief' (*The King against The Chancellor, Masters and Scholars of the University of Cambridge* (1723) 1 Str 557 at p 565).

[17] However, the issue in the present case is not whether a party aggrieved by the decision of an administrative or inferior tribunal has a right to appeal at all; the question is whether the aggrieved party has the right to appeal *all the way up to the Federal Court*. In other words, how many bites of the cherry should a party be allowed in challenging the decision of the tribunal? As Lady Hale remarked in *R (on the application of Cart) v Upper Tribunal (Secretary of State for Justice and others, interested parties) (Public Law Project intervening) R (on the application of MR (Pakistan)) v Upper Tribunal (Secretary of State for the Home Department and another, interested parties) (Public Law Project intervening)* [2011] 4 All ER 127; [2011] UKSC 28 at para [56]:

> ... no system of decision-making is perfect or infallible. There is always the possibility that a judge at any level will get it wrong. Clearly there should always be the possibility that another judge can look at the case and check for error ... But it is not obvious that there should be a right to any particular number of further checks after that.

[18] It is trite that the right of appeal is a creature of statute: 'unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies' (*Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 at p 553). Unless a statute so provides, there is no inherent right of appeal (*Kulasingam v Public Prosecutor* [1978] 2 MLJ 243 at p 244). Statutes conferring, restricting, or denying the right of appeal reflect legislative policy choices in determining the number of times a litigant may require the same question to be decided, and the point at which proceedings should be considered final (*Kemper Reinsurance Co v Minister of Finance and Others* [1998] 3 LRC 633 at p 642; *Valley Beef Co-Operative Ltd v Farm Credit Corp* [2002] SJ No 499 at para [48]; *LP v MP* [2002] 1 IR 219).

[19] It is in the interest of the parties and the community as a whole that there must be some limit to litigation: *interest rei publicae ut sit finis litium* (*Stokes v Christian Brothers High School, Clonmel* [2015] IESC 13 at para [16]; see also *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at p 200). The importance of ensuring finality in appeals was underlined by Hamilton CJ in the Irish case of *In the matter of Greendale Developments Ltd (in liquidation): Stephen Fagan and May Malone v Liam McQuaid* [2000] 2 IR 514:

> ... the finality of proceedings both at the level of trial and possibly more particularly at the level of ultimate appeal is of fundamental importance to the certainty of the administration of law, and should not lightly be breached.

[20] The levels of appeal available to an aggrieved party in a particular case represent the balance between the competing requirements of justice in determining the dispute and finality in litigation. Lord Dyson's views expressed in his lecture entitled 'Time to call it a day: some reflections on finality and the law' (delivered on 14 October 2011 at Edinburgh University) are illuminating in this regard:

> The balance between access to justice and the need for finality is struck in different ways in different contexts. Parliament has intervened in some areas; the common law has set the parameters in others. Special situations call for special treatment ... But generally speaking the golden thread that pervades throughout is the quest for fairness and justice. That is a constant. Views change over time as to how the demands of fairness and justice can best be met and how the balance should be struck.

The scheme in Malaysia

[21] The starting point in determining the appellate jurisdiction of the Federal Court is the Federal Constitution. Article 121(2)(a) provides that:

> (2) There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Federal Court shall have the following jurisdiction, that is to say —
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> (a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof; ...

[22] Article 121(2)(a) does not confer an unlimited right of appeal to the Federal Court. The general empowering provision in art 121(2)(a) must be read in tandem with art 128(3) (*Gurbachan Singh v Public Prosecutor* [1967] 2 MLJ 220 at p 220; *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 at p 399). Article 128(3) states:

> The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such *as may be provided by federal law*. (Emphasis added.)

[23] The balance between ensuring justice and finality in litigation has been struck by Parliament in federal laws for the establishment of various tribunals, with a spectrum of different provisions for challenging the tribunals' decisions. For ease of exposition, in considering whether an appeal lies to the Federal Court, the laws relating to tribunals can be broadly categorised into three types.

[24] The first type consists of statutes which expressly provide the right of appeal from the decision of the tribunal to the High Court, the Court of Appeal, and the Federal Court. One example is the Legal Profession Act 1976. Section 103E(1) allows any party aggrieved by the decision of the Disciplinary Board to appeal to the High Court, and s 103E(5) goes on to provide that 'any appeal against the decision of the High Court shall lie to the Court of Appeal and thereafter to the Federal Court'.

[25] For the purposes of art 128(3), statutes of the first type are 'federal law' which provide for the appellate jurisdiction of the Federal Court. Where such statutes apply, s 96 of the CJA is of no application, and an appeal lies to the Federal Court as of right subject to the terms of the statute.

[26] The second type consists of statutes which provide for recourse to the High Court against the decision of the tribunal, but is silent on whether any further appeal lies to the Federal Court. The recourse to the High Court may be framed in various ways, for instance by way of case stated, application, or

A appeal. The Sabah Land Ordinance (Cap 68) is an example: s 41 thereof states that an appeal shall lie from the decision of the Director of Lands and Surveys to the High Court.

B **[27]** In respect of statutes of the second type, the relevant federal law which determines whether a subsequent appeal lies to the Federal Court is s 96(a) of the CJA. For the Federal Court to be seized of jurisdiction to hear the appeal, as will be elaborated below, one of the conditions under s 96(a) is that the cause or matter was decided by the High Court in the exercise of its original jurisdiction.

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[28] The third type consists of statutes which do not expressly provide for any right of appeal to the court against the decision of the tribunal. One such example is the Consumer Protection Act 1999, which does not make provision for an appeal against an award made by the Tribunal for Consumer Claims.

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[29] In relation to statutes of the third type, since the right of appeal is not inherent but a creature of statute, no appeal lies to the court (*Kulasingam v Public Prosecutor* [1978] 2 MLJ 243 at p 244; *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 at p 553). However, the High Court has an inherent supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals, or other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties (*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at p 191; *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 at para [6]).

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[30] For decisions made by tribunals under the third type of statutes, the recourse for the aggrieved party is to invoke the supervisory jurisdiction of the High Court and challenge the decision of the tribunal by way of judicial review. Given that the supervisory jurisdiction of the High Court has been held to be a form of original jurisdiction (*Tan Sri Eric Chia Eng Hock v Public Prosecutor (No 1)* [2007] 2 MLJ 101 at para [10]), the condition in s 96(a) of the CJA is met, and the aggrieved party may subsequently bring an appeal to the Federal Court.

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[31] The TMA, in particular s 28 thereof, falls within the second type described above. Our decision on question 1 concerns the application of the test in s 96(a) of the CJA to statutes of the second type.

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THE TEST

[32] The conditions for an appeal to lie to the Federal Court are stipulated in s 96 of the CJA:

96 Conditions of appeal

Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court —

(a) from any judgment or order of the Court of Appeal *in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction* involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or

(b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision. (Emphasis added.)

[33] It is clear that s 96(a) stipulates a number of discrete conditions for a judgment or order of the Court of Appeal to be appealable to the Federal Court:

(i) the judgment or order must be 'in respect of' a civil cause or matter decided by the High Court (see *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1);

(ii) the cause or matter must be 'decided' by the High Court (see *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549);

(iii) the High Court must have decided the cause or matter 'in the exercise of its original jurisdiction' (see *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25); and

(iv) it must involve 'a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage' (see *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257).

[34] For the purposes of this appeal, we will confine our discussion to condition (iii) above, and we reserve our views in relation to the interpretation of the remaining conditions.

[35] The cause or matter must have been decided by the High Court in its original jurisdiction to fall within the scope of s 96(a) of the CJA. Where the relevant statute is silent as to the right of appeal to the Federal Court, if the matter was decided by the High Court in its appellate jurisdiction, the matter ends at the Court of Appeal and no further appeal lies to this court (*Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor* [2008] 3 MLJ 771; *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753).

[36] It has been suggested that to determine whether an appeal lies to the Federal Court, it is necessary to inquire whether the tribunal whose decision is appealed against is a subordinate court (*Yong Teng Hing (t/a Hong Kong Trading Co) & Anor v Walton International Ltd* [2011] 5 MLJ 629 at para [46]). This suggestion is based on s 27 of the CJA, which states that the appellate civil jurisdiction of the High Court shall consist of the hearing of appeals from subordinate courts. If the tribunal is a subordinate court, the argument goes, then the High Court must be exercising its appellate jurisdiction in hearing the matter, thus there can be no appeal to the Federal Court.

[37] We consider that the focus on the status of the tribunal is misplaced. For the purposes of s 96(a), the crucial test is not whether the tribunal from which an appeal lies to the High Court is a subordinate court, but whether the High Court is exercising its original jurisdiction. As lucidly explained by Chong Siew Fai CJSS in the unreported case of *Ketua Pengarah Hasil Dalam Negeri v Syarikat Jasa Bumi (Woods) Sdn Bhd* (Civil Application No 08–31 of 1999(S)) (quoted in *Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd (now known as Koperasi Keretapi Bhd) v Kumar a/l Gurusamy* [2011] 2 MLJ 433 at para [10]):

> It is significant to note that in line with the provisions of s 96(a) of the Courts of Judicature Act 1964, the judgment sought to appeal against in our present case is the judgment of the Court of Appeal and not that of the High Court. That being the case, *the pertinent question to consider is not so much as to whether the special commissioners constituted a subordinate court or an inferior court but rather whether the judgment of the Court of Appeal sought to appeal against is in respect of a cause or matter decided by the High Court in the exercise of its original jurisdiction*. In other words, the material point is not so much the status of the Special Commissioners sitting in judgment of the assessment made by the Director General, but rather the nature of the jurisdiction exercised by the High Court when it heard an appeal from the decision of the Special Commissioners by way of case stated. (Emphasis added.)

[38] The same approach was followed by this court in *Koperasi Jimat Cermat* (at para [16]) and *Tio Chee Hing v United Overseas Bank (M) Bhd* [2013] 3 MLJ 212 (at paras [32]–[35]). In the latter case, the approach in *Walton* was expressly discountenanced. Per Suriyadi FCJ (at para [35]):

> The words in s 96(a) are unambiguous, plain and clear and thus must be given their natural and ordinary meaning. It is not for us to invent fancy ambiguities as an excuse not to give effect to its plain meaning or twist and stretch the language beyond its common usage (*Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273; *Tan Weng Chiang v Public Prosecutor* [1992] 2 MLJ 625; *Cheong Seok Leng v Public Prosecutor* [1988] 2 MLJ 481). We agree with the views held by this court that, *regardless of the status of the tribunal, and in this case the director of land survey, whether it is a subordinate court or an inferior court or not, the critical issue is whether the High Court was exercising its original jurisdiction or appellate jurisdiction when hearing the matter* (*Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 MLJ 513). (Emphasis added.)

[39] We also observe that reliance has been placed on a number of cases to show that a particular tribunal is or is not regarded as a subordinate court, for instance the Collector of Land the Collector of Land Revenue (*Sundaram v Chew Choo Khoon* [1968] 2 MLJ 40), the Senior Inspector of Mines (*Lee Soo Chuan v Lai Ah Yan & Anor* [1972] 2 MLJ 33), and the Malaysian Institute of Accountants (*Abdul Halim Mohyiddin v Malaysian Institute of Accountants (MIA)* [2001] 5 MLJ 497). Upon examination, we find that these cases do not concern s 96(a) of the CJA or discuss the original and appellate jurisdictions of the High Court. The common issue in these cases was purely procedural, namely whether the procedure to be applied for appeals to the High Court from those tribunals should be the same as that for appeals from subordinate courts. As such, we are of the view that this line of authorities lends little if any support to the proper test to be applied under s 96(a) of the CJA.

[40] In order to examine the nature of the jurisdiction exercised by the High Court in hearing an appeal against the registrar's decision, it is necessary to first consider the scope and meaning of 'original jurisdiction' and 'appellate jurisdiction'.

ORIGINAL JURISDICTION

[41] Under the heading 'Original Jurisdiction', s 23 of the CJA provides:

> 23 Civil jurisdiction — general
>
> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —
>
> (a) the cause of action arose;
>
> (b) the defendant or one of several defendants resides or has his place of business;
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
>
> (d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.
>
> (2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and *such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction*. (Emphasis added.)

[42] Section 24 provides for the specific instances where the High Court has civil jurisdiction. Appeals from the decision of the registrar or other tribunals are not listed as one of the specific instances in s 24.

Effect of s 23(2) of the CJA

[43] The appellant contended that pursuant to s 23(2), the original jurisdiction of the High Court encompasses any other jurisdiction vested in it by written law. It was argued that the TMA is a written law, thus it must follow that the jurisdiction vested in the High Court to hear appeals under the TMA is an original jurisdiction.

[44] We note that the wording of s 23(2) does not refer to 'original jurisdiction', nor does it describe the nature of 'such other jurisdiction as may be vested'. The suggestion that the jurisdiction referred to in s 23(2) is original jurisdiction is based on the heading for ss 22–25A, which reads 'Original Jurisdiction'.

[45] The function of headings and their proper role in statutory interpretation is as explained in FAR Bennion, *Bennion on Statutory Interpretation* (5th Ed, LexisNexis, 2008) at p 745:

> A heading within an Act, whether contained in the body of the Act or a Schedule, is part of the Act. It may be considered in construing any provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief, and therefore necessarily inaccurate, guide to the material to which it is attached.

[46] While courts are required to take notice of the division of an Act into parts and chapters (s 16 of the Interpretation Acts 1948 and 1967), 'a heading is of very limited use in interpretation because of its necessarily brief and inaccurate nature' (Bennion at p 746).

[47] The case of *Tan Sri Eric Chia Eng Hock v Public Prosecutor (No 1)* [2007] 2 MLJ 101 is an example which illustrates the non-conclusive nature of a heading in the CJA. In that case, Richard Malanjum CJ (Sabah and Sarawak) (at paras [10] and [15]–[16]) held that the supervisory and revisionary jurisdictions of the High Court were distinct. The fact that s 35 (general supervisory and revisionary powers of the High Court) is housed under the heading 'Revision' did not mean that the High Court's supervisory jurisdiction is equated to its jurisdiction for revision. Further, even though s 35 is not placed under the heading 'Original Jurisdiction', it was held that the inherent supervisory jurisdiction of the High Court is in fact a form of original jurisdiction.

[48] The Singapore Supreme Courts of Judicature Act ('the SCJA') is substantially similar in structure and content to the CJA in relation to the jurisdiction of the High Court, with equipollent provisions also housed under the separate headings 'Original Jurisdiction', 'Appellate Jurisdiction' and

'Revision' (prior to the amendment in 2010). The Singaporean equivalent to our s 35 of the CJA was also grouped under the heading 'Revision'. Notwithstanding the common heading, the Singapore Court of Appeal in *Ng Chye Huey and Another v Public Prosecutor* [2007] SGCA 3 (at pp 42–53) likewise held that the High Court's supervisory and revisionary jurisdictions are separate and should not be conflated.

[49] The case of *Ang Cheng Hai & Ors v Public Prosecutor and another appeal* [1995] 3 SLR 201 is another useful illustration. s 18(2) of the SCJA, housed under the heading 'Original Jurisdiction', provides that:

> Without prejudice to the generality of subsection (1), the High Court shall have the powers set out in the First Schedule.

[50] The High Court's power to transfer any proceedings to or from any subordinate court is listed in item 10 of the First Schedule to the SCJA. However, the Singapore Court of Appeal rejected the argument that the High Court order to transfer proceedings can be inferred as an exercise of its original jurisdiction by virtue of the heading 'Original Jurisdiction'. On the contrary, based on a consideration of the facts, it was held that the High Court was not in fact exercising original jurisdiction.

[51] In view of the above authorities, we consider that while headings are generally a permissible guide to interpretation, they may not necessarily be conclusive and admit of no exception in all cases. Thus, we do not agree with the broad proposition that the placement of s 23(2) under the heading 'Original Jurisdiction' necessarily means any other jurisdiction conferred on the High Court by written law must be original jurisdiction. The Income Tax Act 1967 is a clear counter-example: it is a written law which expressly provides that the decisions of the High Court, in hearing cases stated arising from the decision of the Special Commissioners of Income Tax, are made 'in its appellate civil jurisdiction'.

Meaning of original jurisdiction

[52] The original and appellate jurisdictions of the High Court in its present form can be loosely traced to the 'instance jurisdiction' and the 'jurisdiction in error' of the Court of King's Bench in England, prior to the establishment of a unified High Court of Justice in England in 1873. The 'instance' jurisdiction, or the jurisdiction of first instance, is that of hearing the case for the first time as distinct from hearing it on appeal; whereas the appellate jurisdiction consisted of the power to correct errors or to direct that justice had not been done, either by way of a writ of error or a motion for a new trial (AKR Kiralfy *Potter's Historical Introduction to English Law and its Institutions* (4th Ed, London: Sweet & Maxwell, 1962) at pp 125 and 127).

[53] The Supreme Courts of Judicature Act 1873 abolished the existing courts and established a single Supreme Court of Judicature, composed of two divisions: the High Court of Justice, and the Court of Appeal. The Act conferred upon the High Court of Justice 'original jurisdiction', being the jurisdiction at first instance of all the old courts abolished by the Act; and upon the Court of Appeal the appellate jurisdiction formerly exercised by the Chancellor, the Court of Appeal in Chancery, the Exchequer Chamber, and the Privy Council (WJV Windeyer *Lectures on Legal History* (2nd Ed, Revised, Australia: The Law Book Company of Australia, 1957) at p 286).

[54] A detailed account of the history of the Malaysian High Court was given by Abdul Hamid J (as he then was) in *Munusamy v Subramaniam & Ors* [1969] 2 MLJ 108. The Courts Ordinance 1948, the predecessor to the CJA, provided for the original civil jurisdiction of the High Court in s 47 thereof:

> The original civil jurisdiction of the High Court shall be as set out in the Second Schedule hereto.

[55] The effect of s 47 of the Courts Ordinance 1948 was 'abundantly clear'. In *Lee Lee Cheng (F) v Seow Peng Kwang* [1960] 1 MLJ 1, Thomson CJ interpreted the provision as follows:

> In my view it does nothing more than set out what portion of the sum total of the jurisdiction of the Supreme Court is to be *exercised originally by the High Court, that is to say, by the High Court as a Court of first instance*. (Emphasis added.)

[56] It is evident that the term 'original jurisdiction' has been historically understood to mean the jurisdiction to hear a case as a court of first instance. The definition of 'original jurisdiction' in *Black's Law Dictionary* was adopted by the Singapore Court of Appeal in *Ang Cheng Hai* at p 206:

> The concept of 'original jurisdiction' has been defined to mean 'jurisdiction to consider a case in the first instance ... to take cognizance of a cause at its inception, try it and pass judgment upon the law and facts': *Black's Law Dictionary* (6th Ed).

[57] Similarly, this court in *Tio Chee Hing v United Overseas Bank (M) Bhd* [2013] 3 MLJ 212 at para [17] described original jurisdiction as 'the jurisdiction to entertain cases in the first instance'.

[58] Guidance may be gleaned from cases in respect of the High Court's original criminal jurisdiction. The original criminal jurisdiction of the High Court is stipulated in s 22 of the CJA, which opens with the words 'the High Court shall have *jurisdiction to try* [offences]'. This is similar to the formulation in s 23(1), which states 'the High Court shall have *jurisdiction to try* all civil proceedings'. In *Siow Chung Peng v Public Prosecutor* [2014] 4 MLJ 504, it was stressed that original jurisdiction 'is not whatever that is not appellate or

revisionary' (at para [7]). As articulated by Jeffrey Tan FCJ (at para [19]):

> *Under the CJA, 'original criminal jurisdiction' is the jurisdiction to try offences, with s 30 of the CJA as the exception. The key words in s 22(1) of the CJA are 'jurisdiction to try'*. In the instant case, that jurisdiction to try the offence was entrusted to the sessions court. Since the High Court was not the trial court trying the offence and there was no provision to permit an appeal of a criminal matter that emanated from a subordinate court to the Federal Court, this application for leave to appeal, beside being unknown in law and so could not, nay never, be granted in any event, was an absolute non-starter. (Emphasis added.)

[59] Similar to s 87 of the CJA, in Singapore, s 29A(2) of the SCJA restricts criminal appeals to the apex court to decisions 'made by the High Court in the exercise of its original criminal jurisdiction'. In *Ang Cheng Hai*, the Singapore Court of Appeal held that the High Court hearing an application did not exercise original jurisdiction, for it had not 'taken cognizance' of the offence in question.

[60] In *Kiew Ah Cheng David v Public Prosecutor* [2007] 1 SLR 1188, Choo Han Teck J explained original jurisdiction in the following terms (at para [3]):

> The distinction between an original and an appellate jurisdiction is not one that normally requires extensive elaboration. *A court exercises original jurisdiction in all proceedings at first instance*. A court exercises an appellate jurisdiction when it conducts proceedings arising from any decision of a court in the exercise of its original jurisdiction. It is only in the narrowest sense that the proceedings before the judge in Criminal Motion No 22 of 2006 can be regarded as proceedings by a judge exercising his original jurisdiction. That is plausible only because the application for an extension of time was a prayer first made before that court. It had not been adjudicated upon or made in any other court. *Original jurisdiction is a legal term and the word 'original' here does not refer only to a matter that originated from that court and had not arisen before any previous one.* (Emphasis added.)

[61] In that case, the Singapore Court of Appeal held that the decision of a trial judge in respect of an application for extension of time was not an exercise of original jurisdiction. The 'narrowest sense' of original jurisdiction, referring to matters which have not arisen before other courts, was rejected. The interpretation of 'original jurisdiction' in *Ang Cheng Hai* and *Kiew Ah Cheng* was quoted with approval more recently by the same court in *Bachoo Mohan Singh v Public Prosecutor and other applications* [2010] 1 SLR 966.

APPELLATE JURISDICTION

[62] Under the heading 'appellate jurisdiction', s 27 of the CJA reads:

> 27 Appellate civil jurisdiction
>
> The appellate civil jurisdiction of the High Court shall consist of the hearing of

A appeals from subordinate courts as hereinafter provided.

[63] 'Subordinate court' is defined in s 3 of the CJA. It 'means any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court and means in relation to the High Court and such court as by any written law has jurisdiction within the local jurisdiction of the High Court'. It should be reiterated that the crucial test under s 96(a) of the CJA is not whether the tribunal appealed against is a subordinate court, but whether the High Court is exercising its original jurisdiction.

[64] 'Appellate jurisdiction' suggests the correction of a decision (*Tio Chee Hing* at para [17]). The meaning of 'appellate jurisdiction' was explained in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at p 191:

> Where statute provides simply for an appeal, the appellate court has power to re-hear the whole case and, when satisfied that the judgment appealed against cannot stand, it may set aside the judgment and make such orders as ought to have been made at first instance. Thus, appellate jurisdiction is concerned with the merits of a case.

[65] Once the appellate court has jurisdiction to hear and determine an appeal, it may then exercise the jurisdiction of the court or tribunal whose decision is appealed against. For instance, s 69 of the CJA provides that all appeals to the Court of Appeal shall be by way of re-hearing, and that the Court of Appeal shall have all the powers and duties of the High Court, together with full discretion to receive further evidence.

[66] In such circumstances, where the appellate court hearing an appeal exercises the jurisdiction of the court below, the appellate court is exercising its appellate jurisdiction (*Podbery v Peak and another* [1981] 1 All ER 699 at p 701).

[67] A similar position is adopted by the Singapore courts. In *Wong Hong Toy & Anor v Public Prosecutor* [1994] 2 SLR 396 at para [31], Wee Chong Jin CJ held that the application for leave before the High Court was:

> ... so intertwined with the appeal that it cannot be logical to say that while the determination of the appeal is an exercise of its *appellate* criminal jurisdiction, the determination of the application is an exercise of the High Court's *original* jurisdiction. (Emphasis added.)

[68] Following *Wong Hong Toy*, in *Kiew Ah Cheng David*, the Singapore Court of Appeal likewise held that since the application to extend time before the High Court in that case was 'intertwined with the appeal', the High Court

was exercising its appellate jurisdiction in dismissing the application.

[69] This conception of appellate jurisdiction is echoed in the dissenting judgment of Deane J in the Australian High Court case of *Mickelberg and Another v R* [1990] LRC (Crim) 70. On the jurisdiction of the High Court (being the Apex Court) hearing an appeal from a state court, Deane J elaborated that the question was whether the power exercised by the High Court was 'an incident of the grant of appellate jurisdiction' (at pp 84 and 89):

> ... it is relevant to note that *this court exercises the powers which can be exercised in the original jurisdiction of a State court as an ordinary incident of the appellate jurisdiction* conferred by s 73 whenever, after upholding an appeal direct from a State court of first instance and setting aside the orders below, it proceeds to make the orders which should have been (but were not) made by that State court. (Emphasis added.)

[70] Guided by the persuasive authorities above, we agree that the exercise of powers by an appellate court, which are 'incidental to' or 'intertwined with' the appeal, should be regarded as part of the exercise of its appellate jurisdiction.

OUR DECISION

[71] The nature of the jurisdiction exercised by the High Court in determining appeals from tribunals must be determined by reference to the relevant statute itself. The High Court's jurisdiction depends on the nature of the judicial function it exercises (*Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797; [2014] SGCA 61 at para [50]). The correct position was succinctly put in *Eric Chia* at para [12]:

> ... to determine whether or not a particular exercise of power by the High Court is made pursuant to its original jurisdiction, it must necessarily depend on the statutory provision which governs it.

[72] The opposition proceedings before the registrar were brought by the appellant pursuant to s 28 of the TMA. Subsections 28(5), (6) and (7) provide for the right and manner of appeal to the High Court. For completeness of context, s 28 is reproduced herein:

> 28 Opposition to registration
>
> (1) Any person may, within the prescribed time from the date of the advertisement of an application for the registration of a trade mark, give notice to the Registrar and applicant of opposition to the registration.
>
> (2) The notice shall be given in writing in the prescribed manner and shall include a statement of the grounds of opposition.
>
> (3) The applicant shall, within the prescribed time after the receipt of the notice of opposition, send to the Registrar and the opponent a counter-statement, in the

prescribed manner, of the grounds for his application, and, if he does not do so, he shall be deemed to have abandoned his application.

(3A) If the applicant submits a counter-statement under subsection (3), the opponent and applicant shall file evidence and exhibits in the prescribed manner and within the prescribed time in support of the opposition or the counter-statement, as the case may be, to be adduced in the prescribed manner, and if the opponent or applicant fails to do so, the opposition or application, as the case may be, shall be treated as abandoned.

If the applicant files evidence and exhibits under subsection (3A), the opponent may, within the prescribed time, send to the Registrar and applicant evidence in reply to be adduced in the prescribed manner.

(4) After considering the evidence and exhibits and after giving the applicant and the opponent an opportunity of making written submissions, the Registrar shall decide whether:

(a) to refuse to register the trade mark;

(b) to register the trade mark absolutely; or

(c) to register the trade mark subject to such conditions, amendments, modifications or limitations as he may think fit.

(5) *A decision of the Registrar under subsection (4) is subject to appeal to the Court*.

(6) An *appeal* under this section shall be made in the prescribed manner and the Court shall, if required, hear the parties and the Registrar, and shall make an order determining whether, and subject to what conditions, amendments, modifications or limitations, if any, registration is to be permitted.

(7) On the *hearing of an appeal* under this section any party may, either in the manner prescribed or by special leave of the Court, bring forward further material for the consideration of the Court but no further grounds of objection to the registration of a trade mark shall be allowed to be taken by the opponent or the Registrar other than those stated by the opponent except by leave of the Court.

(8) Where any further grounds of objection are taken the applicant shall be entitled to withdraw his application without payment of the costs of the opponent on giving notice as prescribed.

(9) In any *appeal* under this section the Court may after hearing the Registrar, permit the trade mark proposed to be registered to be modified in any manner not substantially affecting the identity of the trade mark, but in any such case the trade mark as modified shall be advertised in the prescribed manner before being registered.

(10) If a person giving notice of opposition or an applicant sending a counter-statement after receipt of such a notice, or an appellant, neither resides nor carries on business in Malaysia, the Registrar or the Court may require him to give security for costs of the proceedings relative to the opposition, application or appeal, as the case may be, and in default of such security being duly given, may treat the

opposition, application, or appeal, as the case may be, as abandoned. (Emphasis added.)

[73] 'Court' is defined in s 3 of the TMA to mean the High Court. Section 67 provides for the powers of the court in hearing an appeal from the decision of the registrar:

67 Discretionary power

In any appeal from the decision of the Registrar under this Act the Court shall have and exercise the same discretionary powers as are conferred upon the Registrar under this Act.

[74] Section 69 further states that:

69 Appeal from Registrar

Except where expressly given by the provisions of this Act or regulations made thereunder there shall be no appeal from a decision of the Registrar but the Court, in dealing with any question of the rectification of the Register (including all applications under section 45) shall have power to review any decision of the Registrar relating to the entry in question or the correction sought to be made.

Nature of proceedings before the High Court

[75] In hearing an appeal from the decision of the registrar under s 28, the High Court does not take cognizance of the matter and determine the dispute at the first instance. On the contrary, the provisions of s 28 indicate that the appeal to the High Court is a rehearing of the original cause before the registrar. The High Court is empowered to examine the merits of the case, correct errors in the registrar's decision, and make such orders as ought to have been made at first instance (*R Rama Chandran*).

[76] Significantly, under s 28(7) of the TMA, the parties may not introduce further materials or additional grounds of objection, not previously raised in the proceedings before the registrar, on appeal to the High Court without the court's leave. These restrictions strongly indicate that the appeal before the High Court is a continuation of the opposition proceedings, where the role of the High Court is to determine the correctness of the registrar's decision based primarily on the materials and grounds then available before the registrar.

[77] The fact that s 69 of the TMA confers upon the High Court the same discretionary powers as the registrar in determining the appeal is entirely consistent with its appellate jurisdiction. As noted above, s 87 of the CJA likewise allows the Court of Appeal, on hearing an appeal from the High Court, to exercise the powers of the High Court; it does not detract from the nature of the appellate jurisdiction exercised.

[78] Further, in hearing an appeal from the decision of the registrar, the High Court exercising the powers of the registrar pursuant to s 67 of the TMA would be acting within its appellate jurisdiction. The High Court's exercise of the s 67 powers is incidental to, and intertwined with, the appeal so as to constitute part of the appellate jurisdiction (*Podbery*, *Wong Hong Toy*, *Kiew Ah Cheng David*, *Mickelberg*).

[79] In our view, the nature of the High Court's role under s 28 of the TMA does not have the characteristics of original jurisdiction, but conversely displays the hallmarks of appellate jurisdiction. We now turn to consider whether the statutory language used in the TMA is consistent with the substantive nature of the jurisdiction conferred on the High Court.

Interpretation of statute

[80] It is well established that the words used in a statute best declare the intention of Parliament; where the words are unambiguous, the court is bound to give effect to them. Per Tindal CJ in the *Sussex Peerage Case* (1844) 11 Cl & Fin 85 at p 143 (quoted with approval by this court in *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685 at para [155]):

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver.

[81] The principle was affirmed by this court in *Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd* [2014] 2 MLJ 1 at para [14]:

> The matter may be summarily dealt with if the language is plain and unambiguous and admits of only one meaning. In *Kamla Devi v Takhatmal* AIR 1964 SC 859 the court remarked:
>
> > If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions.

[82] The choice of words employed by the draftsman is significant. It is presumed that the draftsman employed particular words in order to convey the intention of Parliament. This was emphasised by the House of Lords in *Farrell v Alexander* [1976] 2 All ER 721 at pp 735–736 (quoted with approval by this court in *Generation Products Sdn Bhd v Majlis Perbandaran Klang* [2008] 6 MLJ 325 at para [41]):

> Since the draftsman will himself have endeavoured to express the parliamentary meaning by words used in the primary and most natural sense which they bear in

that same context, the court's interpretation of the meaning of the statutory words used should thus coincide with what Parliament meant to say.

The first or 'golden' rule is to ascertain the primary and natural sense of the statutory words in their context, since it is to be presumed that it is in this sense that the draftsman is using the words in order to convey what it is that Parliament meant to say. They will only be read in some other sense if that is necessary to obviate injustice, absurdity, anomaly or contradiction, or to prevent impediment of the statutory objective.

[83] The word 'appeal' is consistently used in the TMA to describe the hearing before the High Court arising from the decision of the registrar. On a plain and natural reading, the reference to 'appeal' tend to indicate that the nature of the hearing before the High Court is an exercise of its *appellate* jurisdiction.

[84] In drafting the TMA, the draftsman was presumably aware of the basic distinction between the original and appellate jurisdictions of the High Court. Pertinently, this distinction is reflected in the difference in terminology used in respect of different avenues for aggrieved parties to seek redress in the High Court under the TMA. As Thomson CJ held in *Lee Lee Cheng* at p 3:

It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly.

[85] In relation to certification trademarks, s 56(15) allows the aggrieved party to seek a remedy in the High Court by way of 'application' rather than 'appeal':

The Court may, *on the application in the prescribed manner of any person aggrieved*, or on the application of the Registrar, make such order as it thinks fit for expunging or varying any entry in the Register, relating to a certification trade mark ... (Emphasis added.)

[86] Likewise, ss 45 (rectification of the register) and 46 (provisions as to non-use of trademark) provide a mechanism for the aggrieved person not to 'appeal' but to make an 'application' to the court. The distinction between applications and appeals brought to the High Court under the TMA is also reflected in O 87 of the Rules of Court 2012, which makes specific provisions in respect of the TMA. Rule 2 states that 'an *application* to the Court under the Act shall be *begun* by originating summons', whereas r 3 states that 'an *appeal* to the Court under the Act shall be *brought* by originating summons'.

[87] In this context, the significance of the word 'appeal' as opposed to 'application' in sub-ss 28(5), (6) and (7) cannot be understated. The meaning

of a particular word must necessarily be interpreted *noscitur a sociis*, in its context. Nevertheless, we observe that if an application under the TMA is made to the High Court distinct from the hearing of an appeal, giving rise to matters for the High Court to take cognizance at the first instance, the High Court in determining the application may well be exercising its original jurisdiction (*LP v MP*).

[88] In the context of the TMA, we find that the plain meaning of the word 'appeal' is consistent with the substantive nature of the appellate jurisdiction exercised by the High Court under s 28. We also find support for this interpretation from the case of *Koperasi Jimat Cermat*. The case arose from an appeal to the High Court against a decision of the Cooperative Tribunal under s 83(7) of the Cooperative Societies Act 1993 ('the CSA'). This court took into account s 83 of the CSA and the relevant rules of court, both of which refer to the proceedings before the High Court as an 'appeal'. As such, it was held that the matter came before the High Court as an appeal, and accordingly there was no right of appeal to the Federal Court.

[89] The same conclusion was reached in *Tio Chee Hing*, which concerned an appeal to the High Court against a decision of the Director of Lands and Surveys pursuant to s 41 of the Sabah Land Ordinance. Having examined the wording of the relevant provisions, this court concluded that the High Court was exercising its appellate jurisdiction in hearing an appeal under s 41 (at para [33]):

> To fortify our view, s 41 of the Sabah Land Ordinance (Cap 68) clearly legislates that (similar to the Income Tax Act) an appeal shall lie from any order or decision of the director, whether original or an appeal, to the court. Section 4 of this Ordinance provides that 'court' means the 'High Court'. It is succinctly legislated in s 41 that no court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by the Sabah Land Ordinance (Cap 68) to the director. Certainly it bars the High Court from exercising an original jurisdiction thus leaving it only an appellate jurisdiction ...

[90] The appellant relied heavily on the decision of this court on the same issue in *Walton*. In that case, it was held that the High Court exercises an original jurisdiction in hearing appeals from the registrar under s 28 of the TMA, and thus the conditions for an appeal to lie to the Federal Court in s 96(a) of the CJA were satisfied. As stated earlier, the test in *Walton* of determining whether the registrar is a subordinate court has since been departed from in the later case of *Tio Chee Hing*. We would, with respect, prefer the test adopted in *Tio Chee Hing* as discussed above, based on a substantive analysis of the nature of the jurisdiction exercised by the High Court.

[91] It has been brought to our attention that the Australian courts have

preferred a different approach. In *Louise Poletti v Deputy Commissioner of Taxation* [1994] 124 ALR 373, the Federal Court of Australia held that the terminology of appeals in a statute is not determinative of the class of jurisdiction exercised by the court and explained (at p 375):

> Appeals from decisions of Commonwealth officers or federal administrative tribunals, though called appeals, are not appeals in the strict sense. The right of 'appeal' is to a court exercising the judicial power of the Commonwealth, for it is the first occasion on which a court is seized with jurisdiction to consider a matter after it has been dealt with by administrative bodies. Appeals of this kind, of which there are numerous examples (notably appeals to the Federal Court from decisions of the Administrative Appeals Tribunal (s 44 of the Administrative Appeals Tribunal Act 1975 (Cth)) and appeals under Pt V of the Income Tax Assessment Act 1936 (Cth) directly from decisions of the Commissioner to the Federal Court), lie to the Federal Court in the exercise of its original, not appellate, jurisdiction.

[92] The Australian Trade Marks Act 1995 sets up a similar scheme to the TMA, in respect of appeals from the decision of the Registrar of Trade Marks to the federal court. Australian courts have consistently taken the view that the 'appeal' is in fact an exercise of the original jurisdiction by the court. In *Jafferjee v Scarlett* (1937) 57 CLR 115 (followed in *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652; *Registrar of Trade Marks v Woolworths Ltd* (1999) 45 IPR 411), Latham CJ explained that:

> *The first question which arises is a question as to the functions of the court upon this proceeding, which is described in the Trade Marks Act, s 45, as an appeal, though it is really an exercise of the original jurisdiction of the court.*
>
> It has been contended for the respondent that it is the duty of the Registrar to exercise a discretion upon opposition proceedings, and that the court, in determining an appeal from his decision, should regard itself as bound by the exercise of his discretion, unless it should appear that the Registrar acted upon a wrong principle, or that the decision is in some other way clearly wrong. This proposition does not accurately describe the functions of the court upon such an appeal. An appeal may be taken from the decision of the Registrar either to the Law Officer or to the court — ss 43 and 45. Section 44 provides for an appeal from the Law Officer to the court. Section 44(2) specifies the duty of the court upon an appeal — 'The court shall hear the applicant and the opponent and determine whether the application ought to be refused or ought to be granted with or without any modification or conditions'. These words show that it is the duty of the court to decide the matter as upon an original application, and not merely to decide whether the decision of the Registrar can or cannot be supported. This is now the well-established practice of the court ... (Emphasis added.)

[93] While the Australian approach is arguably not without merit, we are of the opinion that to read the word 'appeal' to mean not an appeal in the natural sense, but in fact an exercise of the court's original jurisdiction, is an unduly strained construction. Such a strained construction may be warranted in

certain circumstances, for instance where a literal reading would be in conflict with the legislative purpose, or would bring about unjust, absurd, or anomalous results. However, there is no suggestion in this case that any such circumstances exist. Further, the use of the word 'appeal' in s 28 of the TMA is an accurate reflection of the nature of the jurisdiction exercised by the High Court under that section. As elucidated by Abdoolcader SCJ in *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35 at p 43:

> The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded. ...
>
> The provisions of the Act are abundantly clear to refute any resort to a purposive and strained construction which requires a strained meaning where the literal meaning is not in accordance with the legislative purpose.

[94] We are inclined to agree with the sentiments expressed strongly — perhaps colourfully — in the dissenting judgment of Kirby J in the High Court of Australia in *Ruhani v Director of Police* (2005) 219 ALR 199. Interpreting the phrase 'appeals ... from the Supreme Court of Nauru' in the Nauru Appeals Act, the learned judge said:

> It can scarcely be imagined that, in drafting the Bill that became the Nauru Appeals Act and in enacting it, those responsible were unaware of the distinction drawn in the Australian Constitution between the 'appellate jurisdiction' of this court and its 'original jurisdiction'. While the chosen language cannot determine conclusively the character of the jurisdiction, it would require an unreasonable alteration of the character of the jurisdiction expressed by the two legislatures to turn the language of appeals into the substance of original jurisdiction. Prudent conjuring with words is the stuff of constitutional interpretation. Magic belongs elsewhere.

CONCLUSION

[95] Our answer to question 1 is as follows. Based on our analysis of the nature of the High Court's jurisdiction under s 28 of the TMA, supported by a plain and natural reading of the statutory language, we find that the High Court was exercising its appellate jurisdiction in hearing an appeal from the decision of the registrar under s 28 of the TMA.

[96] Since the matter was not decided by the High Court in the exercise of its original jurisdiction, the present appeal does not meet the statutory condition for an appeal to this court under s 96(a) of the CJA. The matter ends at the Court of Appeal and no further appeal lies to this court.

[97] This is sufficient to dispose of the appeal, and there is no necessity to

answer questions 2, 3 and 4. The appeal is dismissed with costs. A

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor B

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